

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

PATRICIA CLIGGETT,	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	NO. 05 - 583
v.	:	
	:	
JO ANNE B. BARNHART,	:	
COMMISSIONER OF THE SOCIAL	:	
SECURITY ADMINISTRATION,	:	
Defendants.	:	

ORDER AND MEMORANDUM

ORDER

AND NOW, this 9th day of June, 2006, upon consideration of Plaintiff's Motion for Award of Attorney's Fees Pursuant to 28 U.S.C. § 2412, The Equal Access to Justice Act (Document No. 22, filed December 1, 2005), Defendant's Brief in Opposition to Plaintiff's Petition for Attorney's Fees Under the Equal Access to Justice Act (Document No. 23, filed December 19, 2005), Plaintiff Patricia Cliggett's Response to Defendant's Filing in Opposition to the Request for Equal Access to Justice Act Attorney's Fees, and Amendment to Plaintiff's EAJA Motion (Document No. 24, filed December 29, 2005), and Defendant's Reply to Plaintiff's Response to Defendant's Brief for Attorney's Fees under the Equal Access to Justice Act (Document No. 25, filed January 6, 2006), **IT IS ORDERED** that Plaintiff's Motion for Award of Attorney's Fees is **GRANTED** and defendant shall **PAY TO** plaintiff's counsel, Eric J. Fischer, Esquire, the total sum of \$5,557.29, representing attorney's fees and other costs under the Equal Access to Justice Act, 28 U.S.C. § 2412.

MEMORANDUM

I. BACKGROUND

Plaintiff filed an application for Social Security benefits on January 20, 1999. Her claim was denied initially and upon reconsideration. Plaintiff then requested a de novo hearing before an Administrative Law Judge (“ALJ”). Following a hearing on May 16, 2000, the ALJ denied plaintiff’s claim. On September 6, 2000, plaintiff filed a request for review with the Appeals Council. On December 16, 2004, the Appeals Council denied plaintiff’s request for review, and, therefore, the ALJ’s decision became the final decision of the Commissioner.

On February 8, 2005, plaintiff filed a Complaint in this Court, seeking review of the Commissioner’s decision pursuant to 28 U.S.C. § 405(g). The parties then filed Cross-Motions for Summary Judgment. Thereafter, the case was referred to Magistrate Judge Jacob P. Hart for a report and recommendation. On August 18, 2005, Magistrate Judge Hart recommended that the Commissioner’s motion be granted and that plaintiff’s motion be denied. On September 20, 2005, this Court issued a Memorandum and Order, rejecting Magistrate Judge Hart’s Report and Recommendation, granting in part Plaintiff’s Motion for Summary Judgment, remanding the case to the Commissioner for further proceedings, and entering judgment in favor of plaintiff.

The applicability of Listing 1.08 to plaintiff’s epidural fibrosis is a key issue in the case. The Magistrate Judge accepted the Commissioner’s argument that the ALJ did not err in failing to consider Listing 1.08 because it did not become effective until one and a half years after the ALJ’s decision. This Court rejected that recommendation, relying on 66 Fed. Register 58011 and Coppola v. Barnhart, 99 Fed. Appx. 365 (3d Cir. 2004), ruling that “when final changes to the Social Security regulations are made, the new regulations should be applied to claims of

applicants for benefits that are pending at any stage of the administrative review process.” Mem. & Ord. at 7. As a result, the Court remanded the case to the Social Security Administration “so as to give the Commissioner an opportunity to set forth her position on the applicability of Listing 1.08 to epidural fibrosis,” one of plaintiff’s major ailments. Id. at 8.

Presently before the Court is Plaintiff’s Motion for Award of Attorney’s Fees Pursuant to the Equal Access to Justice Act (“EAJA”), 28 U.S.C. § 2412. The Court concludes that plaintiff’s counsel is entitled to attorney’s fees under the EAJA because plaintiff was the prevailing party and the Commissioner’s position was not substantially justified. However, because the Court concludes that counsel’s request for fees is, in part, unreasonable, the Court has reduced the award from \$7,116.44 to \$5,557.29.

II. DISCUSSION

A prevailing party is entitled to attorney’s fees unless “the court finds that the position of the [Commissioner] was substantially justified.” 28 U.S.C. § 2412(d)(1)(A). The “position” of the Commissioner includes her litigation position in federal court as well as any agency position that preceded and necessitated the litigation. Washington v. Heckler, 756 F.2d 959, 960 (3d Cir. 1985). The burden of proving substantial justification rests with the Commissioner. Id. In order to meet her burden, “the [Commissioner] must show: (1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory it propounds; and (3) a reasonable connection between the facts alleged and the legal theory advanced.” Id.

The prevailing party is not entitled to attorney’s fees solely because the Commissioner loses the underlying case. Dougherty v. Lehman, 711 F.2d 555, 566 (3d Cir. 1983). The Commissioner’s position is “substantially justified” if it is “justified to a degree that could satisfy

a reasonable person.” Pierce v. Underwood, 487 U.S. 552, 565 (1988). In other words, the Commissioner’s position is substantially justified “if it has a reasonable basis in both law and fact.” Morgan v. Perry, 142 F.3d 670, 684 (3d Cir. 1998); see also Russell v. Heckler, 814 F.2d 148, 153 (3d Cir. 1987) (“[A] legal position is substantially justified if it relates to an unsettled or close question of law, but not if it offends established precedent.”).

Based on this Court’s Memorandum and Order dated September 20, 2005, remanding the case to the Social Security Administration for further proceedings, plaintiff was the prevailing party in this litigation. Thus, the Court begins its analysis by determining whether the Commissioner’s position was substantially justified. The Court concludes that it was not.

A. The Commissioner’s Position Was Not Substantially Justified

The Commissioner argues that her position was substantially justified because Magistrate Judge Hart concluded that summary judgment should have been granted in her favor. This argument is unavailing, because plaintiff did not raise the issue under 66 Fed. Register 58011 until the Report & Recommendation had been submitted. Thus, Magistrate Hart did not provide the Court with a recommendation, either way, on the issue that ultimately led to the decision to remand the case to the Commissioner for further proceedings.

In addition, the Commissioner cannot argue that the issue upon which remand was granted is unsettled. See Xayaseng v. Barnhart, 2006 WL 891177, at *1 (E.D. Pa. Apr. 5, 2006) (“When a case turns on a question of law, the Commissioner must show that her argument presented a close or unsettled question of law, in order to establish that her position was substantially justified.”). As explained in this Court’s Memorandum and Order remanding the case, it is well-settled law that “new regulations should be applied to claims of applicants for

benefits that are pending at any stage of the administrative review process.” Mem. & Ord. at 7.

B. An Award of Attorney’s Fees Is Just

The Commissioner contends that plaintiff’s counsel is not entitled to attorney’s fees under the EAJA, because the circumstances of the case make an award unjust. See 28 U.S.C. § 2412(d)(1)(A). In support of this argument, the Commissioner explains that this Court’s decision to remand “was informed” by the Third Circuit’s opinion in Coppola v. Barnhart, 2004 WL 1088368, and that plaintiff failed to raise this issue, let alone the Coppola decision, in her motion for summary judgment. The Court disagrees.

While the Court relied upon its own research in deciding to remand the case, plaintiff provided the impetus for this research by bringing 66 Fed. Register 58011 to the Court’s attention. Plaintiff’s position as the prevailing party was a direct by-product of counsel’s research and investigation. Thus, applying equitable considerations, the Court concludes that an award of attorney’s fees to plaintiff’s counsel is just.

C. Counsel’s Request For Attorney’s Fees Is Unreasonable In Part

The party seeking attorney’s fees has the burden of proving that its request is reasonable. Rode v. Dellarciprete, 892 F.2d 1177, 1183 (3d Cir. 1990). “Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary” Hensley v. Eckerhart, 461 U.S. 424, 434 (1983). In reviewing a request for fees, the Court has substantial discretion to fix the amount of an EAJA award. Commissioner, INS v. Jean, 496 U.S. 154, 161 (1990). When making a determination of what amounts to a reasonable fee under the EAJA, “it is important ‘for the district court to provide a concise but clear explanation of its reasons for the fee award.’” United States v. Eleven

Vehicles, 200 F.3d 203, 211 (3d Cir. 2000) (quoting Hensley, 461 U.S. at 437).

Plaintiff's counsel has requested attorney's fees for 44.45 hours spend on plaintiff's case. The Commissioner argues that 32.90 hours is a reasonable amount of time for this case. The parties do not dispute that the hourly rate of \$160.10 represents the statutorily established rate specifically authorized by the EAJA (28 U.S.C. § 2412(d)(2)(A)), as adjusted for inflation. Regarding her proposed reduction of 11.55 hours in billable time, the Commissioner points to the time spent preparing plaintiff's motion for summary judgment, plaintiff's reply brief, and plaintiff's objections to the Report and Recommendation.

Plaintiff's counsel states that he maintains a caseload of "more than 500 cases" and has represented "thousands of individual clients" in Social Security cases. Fischer Decl. at 1-2. Based on these facts, the Court concludes plaintiff's attorney is experienced in this field and the Commissioner is entitled to "additional efficiency." As a result, the Court concludes that plaintiff's request for fees for 44.45 hours is excessive and agrees with the Commissioner on this issue. To start, the billable hours for plaintiff's motion for summary judgment is reduced from 29.05 to 20.00 hours because this case did not present any novel legal issues. In addition, the billable hours for plaintiff's reply and plaintiff's objections to the Report & Recommendation are reduced to 4.00 and 3.00, respectively, because they, by and large, restate arguments previously set forth by plaintiff. As a result of these reductions, plaintiff's counsel is entitled to an EAJA award of \$5,267.29 plus litigation costs of \$290.00.

D. The Commissioner Did Not Act in Bad Faith

In the reply brief, plaintiff's counsel argues that he is entitled to market rate fees under the EAJA's bad faith provision because the Commissioner has engaged in "dilatory tactics" and has

made misrepresentations to the Court. The Commissioner “acts in bad faith when [her position] (1) is entirely without color and (2) has been asserted wantonly, for purposes of harassment or delay, or other improper reason.” F.T.C. v. Freecom Communications, Inc., 401 F.3d 1192, 1196-97 (10th Cir. 2005) (citing Federal Deposit Ins. Corp. v. Schuchmann, 319 F.3d 1247, 1250 (10th Cir. 2003)). The Court rejects plaintiff’s bad faith argument because plaintiff has failed to make the requisite showing under 28 U.S.C. § 2412(b). There is no evidence that the Commissioner’s position in this case was without color or that it was asserted wantonly, for purposes of harassment or delay, or any other improper reason.

III. CONCLUSION

For the foregoing reasons, the Court concludes plaintiff was the prevailing party, the Commissioner’s position was not substantially justified, and an award of fees in this case is just. As a result, plaintiff’s counsel is entitled to attorney’s fees and litigation costs under the EAJA. Because counsel’s request for fees is unreasonable, in part, the Court reduces the requested billable hours from 44.45 to 32.90 hours. The Court denies plaintiff’s request for market-rate fees because the Commissioner did not act in bad faith and applies the uncontested billable rate of \$160.10 per hour. Plaintiff’s counsel is thus entitled to \$5,267.29 in attorney’s fees plus \$290.00 in litigation costs.

BY THE COURT:

/s/ Honorable Jan E. DuBois
JAN E. DUBOIS, J.